Best Products Company, Inc. *and* United Food and Commercial Workers Local 428, AFL-CIO. Case 32-CA-6425

17 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

Upon a charge filed by the Union 26 April 1984, the General Counsel of the National Labor Relations Board issued a complaint 7 May 1984 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 28 March 1984, following a Board election in Case 32-RC-1575, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); *Frontier Hotel*, 265 NLRB 343 (1982).) The complaint further alleges that since 12 April 1984 the Company has refused to bargain with the Union. On 16 May 1984 the Company filed its answer admitting in part and denying in part the allegations in the complaint.

On 4 June 1984 the General Counsel filed a Motion for Summary Judgment. On 7 June 1984 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed a response.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Company's answer admits its refusal to bargain, but attacks the validity of the certification on the basis of its objections to the election in the representation proceeding. In addition, the Respondent urges that a hearing is necessary to determine whether the employee turnover since the 3 June 1982 election presents special circumstances relieving the Respondent of its bargaining obligation. The General Counsel argues that all material issues have been previously decided. We agree with the General Counsel.

The record, including the record in Case 32-RC-1575, reveals that an election was held 3 June 1982 pursuant to a Stipulation for Certification Upon Consent Election issued by the Regional Director for Region 32. The tally of ballots shows that of approximately 60 eligible voters, 38 cast ballots for and 26 ballots against representation by the Union. There were seven challenged ballots, which were not determinative of the results of the election. The Respondent filed objections to the election 7 and 16 June 1982. The Regional Director investigated those objections and issued a report 26 July 1982 overruling, in part, three of the Respondent's objections and ordering a hearing on Objection 2, dealing with the unequal number of election observers, and those parts of Objections 1, 3, and 4 dealing with allegations of union misrepresentation. On 29 September 1982 the Regional Director issued a supplemental report in light of the intervening Board decision in *Midland Life Insurance Co.*, 263 NLRB 127 (1982). The report recommended that *Midland* obviated the need for a hearing on the alleged misrepresentations and limited the scope of the hearing to Objection 2. On 11 January 1983 the Board adopted the Regional Director's Supplemental Report and Recommendations on Objections and ordered a hearing on Objection 2. On 7 September 1983 the hearing officer issued his report recommending that Objection 2 be overruled. On 26 September 1983 the Company filed exceptions to the recommendation. On 28 March 1984 the Board, by a three-member panel, adopted the hearing officer's recommendations and certified the Union as the exclusive bargaining representative of the employees in the appropriate unit. (269 NLRB 578.)

By letter dated 6 April 1984 the Union requested the Company to bargain. Since on or about 12 April 1984 the Company has failed to bargain with the Union.

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Company were or could have been litigated in the prior representation proceeding. The Company does not offer to adduce at

[1] The Respondent has also filed a motion to designate the full transcript in the underlying representation case and the *Excelsior* list of eligible voters in the 3 June 1982 election as part of the record. As noted above official notice is taken here of the "record" in the representation proceeding in any event. Moreover, as set forth below, turnover subsequent to the election does not constitute "extraordinary circumstances" warranting revocation of the Union's certification. Accordingly, even assuming that the *Excelsior* list would, as the Respondent alleges, establish such turnover, it would not change the result herein. The Respondent's motion is therefore denied.

a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.[2] We therefore find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a Virginia corporation, is engaged in the retail sale of general merchandise, and has an office and place of business in Campbell, California. During the past 12 months it derived gross revenues in excess of $500,000, and purchased and received goods or services valued in excess of $5000, originating outside the State of California. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held 3 June 1982 the Union was certified 28 March 1984 as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time employees employed by the Employer at its 550 W. Hamilton Avenue, Campbell, California, facility; excluding all confidential employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since 6 April 1984 the Union has requested the Company to bargain, and since 12 April 1984 the Company has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

[2] The Respondent contends that employee turnover since the certification constitutes special circumstances warranting a new hearing. It is well settled, however, that in these circumstances employee turnover subsequent to an election does not affect the validity of the certification. *Gunton Co.*, 227 NLRB 1875, 1876 (1977), enfd. 596 F.2d 175 (6th Cir. 1979); *Mr. B. IGA, Inc.*, 255 NLRB 1311 (1981), enfd. 677 F.2d 32 (8th Cir. 1982).

CONCLUSIONS OF LAW

By refusing on and after 12 April 1984 to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Best Products Company, Inc., Campbell, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Food and Commercial Workers Local 428, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees employed by the Employer at its 550 W. Hamilton Avenue, Campbell, California, facility; excluding all confidential employees, guards, and supervisors as defined in the Act.

(b) Post at its facility in Campbell, California, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Food and Commercial Workers Local 428, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time employees employed by the Employer at its 550 W. Hamilton Avenue, Campbell, California, facility; excluding all confidential employees, guards, and supervisors as defined in the Act.

BEST PRODUCTS COMPANY, INC.